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# Putting the Right to Data Portability into a Competition Law Perspective<sup>1</sup>

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## **Abstract**

This article explores the scope of application and possible implementation of the right to data portability as introduced in the proposal for a General Data Protection Regulation. In October 2013, the European Parliament adopted amendments to the proposal that originally had been submitted by the European Commission in January 2012. Although some of these amendments also targeted the right to data portability, the principles underlying this right as proposed by the Commission are still intact. The right to data portability consists of two aspects: the right to obtain a copy of personal data that has been provided by the data subject and the right to transfer this data directly from controller to controller. Attention is particularly paid to the second aspect that entitles data subjects to ask their controller to transmit their data directly to another controller without any additional action on their part. Furthermore, the potential effect of the right to data portability is analyzed from a competition law perspective. In this regard, attention is paid to the question whether the proposed right could remedy user lock-in in online services, such as social networks. A comparison will be made between competition enforcement and the imposition of regulation for facilitating data portability. Regulation applies generally, while competition enforcement is more flexible and may only take place in specific situations. Depending on the factual circumstances, restrictions on data portability may qualify as abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union.



## **Keywords**

Data portability, data protection law, competition law, online services.

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## Introduction

In January 2012, the European Commission adopted a proposal for a General Data Protection Regulation<sup>2</sup> that would replace Directive 95/46<sup>3</sup> which was adopted in 1995 and needs to be updated in order to adequately deal with technological developments that have brought new challenges for the protection of personal data.<sup>4</sup> In the Commission's view, personal data protection plays an important role in building trust in the online environment. 'Trust will stimulate consumers to buy online and adopt new services. It is therefore key to economic development and innovation.'<sup>5</sup> One of the instruments by which the Commission seeks to build trust in online services, is the newly introduced right to data portability. This right would give consumers more control over the data that providers hold about them by enabling the transfer of data 'from one electronic processing system to and into another, without being prevented from doing so by the controller'.<sup>6</sup> While its main policy objective is to ensure that individuals are in control of their personal data and trust the digital environment,<sup>7</sup> the right to data portability may also reduce lock-in by enabling users to switch easily between services. In this article, the right to data portability will be analyzed from a competition law perspective.

## Right to Obtain a Copy and Right to Data Portability

The right to data portability was originally introduced by the European Commission in Article 18 of the proposal for a General Data Protection Regulation.<sup>8</sup> The discussion of the proposal in the European Parliament has led to the adoption of several amendments.<sup>9</sup> As a result of

<sup>2</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

<sup>3</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

<sup>4</sup> Next to the proposal for a General Data Protection Regulation, the European Commission also adopted a proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final.

<sup>5</sup> Proposal for a General Data Protection Regulation, p. 1.

<sup>6</sup> Proposal for a General Data Protection Regulation, p. 9.

<sup>7</sup> Commission Staff Working Paper – Impact Assessment accompanying the General Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data ("Impact Assessment report"), SEC(2012) 72 final, p. 43.

<sup>8</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("General Data Protection Regulation"), COM(2012) 11 final.

<sup>9</sup> All the compromise amendments that were adopted by the European Parliament are available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/comp\\_am\\_art\\_01-29/comp\\_am\\_art\\_01-29en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/comp_am_art_01-29/comp_am_art_01-29en.pdf) (Articles 1-29) and [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/comp\\_am\\_art\\_30-91/comp\\_am\\_art\\_30-91en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/comp_am_art_30-91/comp_am_art_30-91en.pdf) (Articles 30-91). An unofficial consolidated version of the proposal for a General Data Protection Regulation as amended by the European Parliament is available at <http://www.janlabrecht.eu/fileadmin/material/Dokumente/DPR-Regulation-inofficial-consolidated-LIBE.pdf>.

some of these amendments, the right to data portability is merged with the right of access and can now be found in Article 15(2a). However, the principles underlying the original right to data portability remain part of the amended proposal. On the basis of the amended text of the General Data Protection Regulation, the European Parliament will negotiate with the Council and try to reach a common agreement before the European elections in May 2014. Once the Regulation is adopted, Member States will have to start applying the new rules after two years.<sup>10</sup>

The right to data portability consists of two aspects. In the original proposal, each aspect was included in a separate section of Article 18 that exclusively covered the right to data portability. As a result of the amendments of the European Parliament, both aspects have been inserted in one section of the article on the right to access, namely Article 15(2a). The first sentence of this section deals with the right to obtain a copy of data and the second sentence provides the right to transfer data.<sup>11</sup> In order to further improve access of individuals to their data, data subjects<sup>12</sup> are given the right to obtain a copy of the personal data<sup>13</sup> undergoing processing *'in an electronic and interoperable format which is commonly used and allows for further use by the data subject without hindrance from the controller from whom the personal data are withdrawn'*. This would, for instance, entitle social media users to obtain the data that they inserted in a particular social networking site in a form that can be easily used in another social networking platform. An example of a service that already allows social media users to download their data is Google Takeout. By way of this tool, Google offers its users the possibility to download the data that they have created in Google's social networking site Google+ in a variety of open formats so that users can easily import the data into other internet services.<sup>14</sup> A precondition for the right to get a copy of the data to be applicable is that the personal data is processed by electronic means. In the amended text, the European Parliament dropped the additional prerequisite that the data must be processed in a structured and commonly used format.<sup>15</sup> This widens the scope of the right to obtain a copy, since it will now apply to all data that is processed electronically irrespective of the format that is used. In addition, the duty that is imposed on data processors seems to be heavier under the amended proposal. While in the original proposal data subjects had the right to obtain data *'in a commonly used format'*, this term is replaced by *'interoperable'* in the amended text. This suggests that data processors have a duty to make their data formats compatible and ensure that their systems can process data from different origins.

The second and proper aspect of the right to data portability can be found in the second sentence of Article 15(2a) of the amended proposal. Where technically feasible and available, users have the right to transfer their personal data to another processing system. This aspect

<sup>10</sup> Article 91(2) of the amended proposal for a General data Protection Regulation.

<sup>11</sup> In the original proposal submitted by the European Commission, the right to obtain a copy could be found in Article 18(1) and the right to transmit data between systems in Article 18(2).

<sup>12</sup> Article 4(2) of the amended proposal for a General Data Protection Regulation defines "data subject" as a person *'who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, unique identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or gender identity of that person'*. In this article, the terms "data subject", "individual", "consumer" and "user" will be used interchangeably.

<sup>13</sup> Article 4(2) of the amended proposal for a General Data Protection Regulation defines "personal data" as *'any information relating to an identified or identifiable natural person ('data subject')'*.

<sup>14</sup> For a description of the service Google Takeout, see [https://support.google.com/takeout/answer/2508459?hl=en&ref\\_topic=2508503](https://support.google.com/takeout/answer/2508459?hl=en&ref_topic=2508503).

<sup>15</sup> For an analysis of the potential meaning of these terms, see G. Zanfir, 'The right to Data portability in the context of the EU data protection reform', 2(3) *International Data Privacy Law* 149 (2012), p. 157.



of the right to data portability goes beyond the right to obtain a copy as contained in the first sentence of Article 15(2a), since it requires controllers to transmit the data directly to another controller at the request of the data subject. To use the example of social networks again, a Facebook user would be entitled to ask Facebook to transfer personal data directly to Google+, instead of downloading the data from Facebook him- or herself and upload it again to Google+. However, this right only applies where a direct transfer of personal data is *'technically feasible and available'*. Under the original proposal submitted by the European Commission, the right to data portability would apply generally to all automated processing systems irrespective of whether transfer of data was already technically possible. The amendment by the European Parliament has thus significantly toned down the potential impact of the right to data portability. If the 'new' right to data portability would be interpreted in such a way as to be applicable exclusively if a technical measure for direct transfer of data is already available, users would only be able to rely on it in very limited circumstances. This may undermine the objective of the Commission to give users more control over their data in the online environment. The analysis in the remainder of this article will be limited to the aspect of the right to data portability that gives users the right to transfer their data to another service.<sup>16</sup>

### Scope of Application of the Right to Data Portability

The exact scope of application of the right to data portability depends on the interpretation that will be given to some of its key terms. Next to the meaning of the phrase *'where technically feasible and available'*, the definition of other terms such as *'provided personal data'* also needs to be clarified. Data that the data subject has inserted into a service, such as profile information uploaded into a social network and documents stored in a cloud service, will probably fall within this definition. But providers do not only possess information that has been provided by users themselves. They may also keep statistics about the use of their service and create data for analytical purposes. This type of data will most likely fall outside the scope of the right to data portability. However, the proposal for a General Data Protection Regulation does not clarify the status of the data that lies between these two scenarios. An example of information that is provided by both the data subject and the service provider is the profile of sellers on auction websites. While the contact information and the advertisements are provided by the seller himself, the service provider adds feedback scores to the seller's profile on the basis of the number of positive or negative ratings the seller has received.<sup>17</sup> It is not clear whether the part of the seller's profile that involves the reputation that a seller has built on a particular auction platform will also be portable, since strictly interpreted it is not provided by the data subject. A clarification of the interpretation of this phrase is therefore welcome.<sup>18</sup>

In addition, it is not clear to which systems the right to data portability will apply. In the recitals a social network is mentioned as an example of a system to which the new right would

<sup>16</sup> In the remainder of this article the term "right to data portability" will thus be used to refer to the right that the second sentence of Article 15(2a) (Article 18(2) of the original proposal submitted by the European Commission) of the amended proposal for a General Data Protection Regulation provides to users, i.e. the right to transfer their data to another controller where this is technically feasible and available.

<sup>17</sup> eBay is an example of an auction platform that adds feedback scores to the profiles of sellers, see <http://pages.ebay.com/help/feedback/scores-reputation.html>.

<sup>18</sup> P. Swire & Y. Lagos, *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique*, 72(2) *Maryland Law Review* 335 (2013), p. 347-349.

apply.<sup>19</sup> When the proposal enters into force, the right to data portability would thus enable social media users to transfer their contacts, photos, videos and status updates to another networking site. The scope of application of the right to data portability is not limited to social networks. According to the text of Article 15(2a), the new right would apply to all controllers that process personal data by electronic means. It would therefore also address other forms of cloud computing and web services.<sup>20</sup> An example different from that of social networks could be the transfer of documents or files that a user has uploaded into a cloud storage service. In this context, the right to data portability would enable users to move all their documents and files to a competing cloud storage service directly without having to download the data, save it onto their own devices and upload it again to a new service.

### **Technical Measures to Establish Data Portability**

In order to establish an effective form of data portability, there should be a technical measure that makes it possible for users to seamlessly transfer their data from one service to another. This implies that the “receiving” service is able to process the data extracted from another platform in an efficient manner. To some extent, this would require a “standard” format for data storage. Under the original proposal of the General Data Protection Regulation, Article 18(3) gave the European Commission the power to specify the ‘*technical standards, modalities and procedures for the transmission of personal data*’ under the right to data portability. However, it can be questioned whether the Commission is in the right position to determine the standards and procedures for the data to be transferred. Considering the different design features of online services, it could become difficult, if not impossible, to come up with a format that would ensure that all the transferred data is displayed in the same way as in the service from which the data was extracted. The Commission would then have to decide which features will be standardized. This might require some services to change part of their design and limit the development of new applications that introduce new functionalities.<sup>21</sup> In amendments to the proposal, members of the European Parliament tackled this issue by leaving it to the service providers themselves to agree upon standard formats. In the amended text, Article 18(3) was deleted and the following sentence was added to the recital that was renumbered as recital 51a: ‘*Data controllers should be encouraged to develop interoperable formats that enable data portability*’.

### **Data Portability as Remedy for User Lock-in**

It can be a business strategy of service providers to prevent users to transfer their data to a competing service. By limiting the possibility of data portability, service providers are creating switching costs. These costs arise if a user finds it costly to switch from one service provider to another. Switching costs are created as soon as the user makes an investment specific to his current service provider that must be duplicated for any new provider. Due to switching costs, users can become locked-in to a given service. Irrespective of the possible higher quality of a different service, users will stay with their current provider. The degree of lock-in is determined by the switching costs. If the switching costs are high, providers will be able to create a

<sup>19</sup> Recital 51a of the amended proposal for a General Data Protection Regulation.

<sup>20</sup> R.C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 *Northwestern University Law Review Colloquy* 1 (2008), p. 6-7 describing the application of data portability to auction platforms like eBay.

<sup>21</sup> C.S. Yoo, *When Antitrust Met Facebook*, 19 *George Mason Law Review* 1147 (2012), p. 1155.

high degree of user lock-in.<sup>22</sup> For providers that heavily rely on data provided by users, restricting data portability is a way to tie users to their services.<sup>23</sup> Social media are an example of this.

While social networking sites like Facebook and Google+ offer users the possibility to obtain a copy of their data,<sup>24</sup> there are still considerable limits on the direct transfer of personal information to other platforms. Moreover, social network providers do not allow third-party sites to directly acquire the user's information. For instance, Facebook blocks Google Chrome's extension for exporting friends.<sup>25</sup> In practice, users thus have to manually re-enter their profile information, photos, videos and other information in the new platform if they want to switch from one social network to another. As a result, users may find it too cumbersome to switch to another service. Instead, they will stay with the social network that they joined first, even if better or more privacy friendly services become available.<sup>26</sup> The inability of users to move their data between social networks has also been identified as a competition problem.<sup>27</sup>

## Enforcing Data Portability under European Competition Law

The Commissioner for Competition has confirmed that the proposed right to data portability 'goes to the heart of competition policy'. With regard to switching costs, he argued that '[c]ustomers should not be locked-in to a particular company just because they once trusted them with their content'. While stating '[w]hether this is a matter for regulation or competition policy, only time will tell', he acknowledged the right to data portability as a new tool under data protection law but also did not eliminate competition law intervention for facilitating data portability.<sup>28</sup> It therefore cannot be excluded that the European Commission will also take action on the basis of competition law if a dominant firm does not allow users to take their data with them when switching services.<sup>29</sup> Restrictions on data portability may lead to liability under Article 102 of the Treaty on the Functioning of the European Union (TFEU). This article prohibits abusive behaviour of dominant undertakings.

<sup>22</sup> C. Shapiro & H.R. Varian, *Information Rules. A Strategic Guide to the Network Economy* (Boston 1999), p. 104.

<sup>23</sup> G. Zanfir, The right to Data portability in the context of the EU data protection reform, 2(3) *International Data Privacy Law* 149 (2012), p. 152.

<sup>24</sup> Facebook offers the "Download Your Info" feature (<https://www.facebook.com/help/131112897028467>) and Google has the "Google Takeout" service ([https://support.google.com/takeout/answer/2508459?hl=en&ref\\_topic=2508503](https://support.google.com/takeout/answer/2508459?hl=en&ref_topic=2508503)).

<sup>25</sup> Under Facebook's Terms of Services on Safety, Facebook prohibits automatic collection of user content: 'You will not collect users' content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our prior permission', available at <https://www.facebook.com/legal/terms>.

<sup>26</sup> Impact Assessment report, p. 28.

<sup>27</sup> See C.S. Yoo, When Antitrust Met Facebook, 19 *George Mason Law Review* 1147 (2012), p. 1154-1155 and S.W. Waller, 'Antitrust and Social Networking', 90 *North Carolina Law Review* 1771 (2012), p. 1789-1790.

<sup>28</sup> Commissioner Almunia, Competition and personal data protection, speech given at the *Privacy Platform event: Competition and Privacy in Markets of Data* in Brussels on 26 November 2012, available at [http://europa.eu/rapid/press-release\\_SPEECH-12-860\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm).

<sup>29</sup> D. Meyer, 'Facebook beware? EU antitrust chief warns over data portability', 27 November 2012, available at <http://www.zdnet.com/facebook-beware-eu-antitrust-chief-warns-over-data-portability-7000007950/>. See also: D. Geradin & M. Kuschewsky, Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue, SSRN Working Paper February 2013, p. 11, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2216088](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088).

The European Court of Justice has defined dominance as '*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*'.<sup>30</sup> Market share is an indicator of dominance. The larger the market share, the more likely the finding of dominance. Case law of the European Court of Justice has made clear that market shares of 50% or higher are in principle in themselves evidence of the existence of a dominant position.<sup>31</sup> For lower market shares, the presence of additional circumstances, such as economies of scale, barriers to entry and control of infrastructure not easily duplicated, is necessary to find dominance.<sup>32</sup> Abuse can take different forms. A refusal of a dominant firm to facilitate data portability can constitute a form of exclusionary abuse. A lack of data portability may lead to entry barriers for competitors and breach Article 102(b) TFEU by limiting markets and technical development to the prejudice of consumers.<sup>33</sup>

Under Article 102 TFEU, competition authorities are entitled to impose duties on dominant undertakings in order to remedy the abusive behaviour.<sup>34</sup> In order to remedy a lack of data portability, authorities could impose a duty on a dominant provider to enable users to transfer their data between services. The difference with the proposal for a General Data Protection Regulation in this regard is that the proposal gives data subjects a right to data portability, while competition authorities can impose a duty on dominant service providers to facilitate data portability on the basis of Article 102 TFEU. This suggests that competition enforcement may be more strict. This can also be seen from the difference in the height of fines that can be imposed for a breach of the two regimes. Whereas Article 23(2a) of Regulation 1/2003 entitles the European Commission to impose a fine up to 10% of the total turnover for a breach of Article 102 TFEU, data protection authorities may only impose a fine up to 5% of the annual worldwide turnover under Article 79(2a)(c) of the amended proposal for a General Data Protection Regulation in case an undertaking does not comply with its obligations.<sup>35</sup>

## Regulation versus Competition Enforcement

In the proposal, the reduction of user lock-in is not mentioned as an objective of the right to data portability. The main goal of the new right is to ensure that users stay in control of their

<sup>30</sup> Case 27/76 *United Brands* [1978] ECR 207, par. 65.

<sup>31</sup> Case 85/76 *Hoffman-La Roche* [1979] ECR 461, par. 41 and Case C-62/86 *Akzo Chemie* [1991] ECR I-3359, par. 60. In the Guidance Paper on Article 102 TFEU, the Commission stated that '*experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market*' (Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009], OJ C 45/7, par. 14).

<sup>32</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002], OJ C 165/6, par. 78.

<sup>33</sup> C.S. Yoo, When Antitrust Met Facebook, 19 *George Mason Law Review* 1147 (2012), p. 1154-1155 and D. Geradin & M. Kuschewsky, Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue, SSRN Working Paper February 2013, p. 11.

<sup>34</sup> Article 5 and 7(1) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002], OJ L1/1.

<sup>35</sup> Under the original proposal for a General Data Protection Regulation as submitted by the European Commission, Article 79(5)(d) entitled the data protection authorities to impose a fine up to only 1% of the annual worldwide turnover of an undertaking that would intentionally or negligently hinder the data subject to transmit personal data to another application.



personal data in the online environment.<sup>36</sup> Nevertheless, both the right to data portability and competition enforcement for facilitating data portability will remedy user lock-in. By enabling users to transfer their data easily from one system to another, switching costs are reduced and the risk of lock-in is lowered. Data portability under either regime will also enhance competition between service providers, since it will be easier for providers to attract new users once they can take their data with them. In the Impact Assessment report the Commission states that '[p]ortability is a key factor for effective competition'.<sup>37</sup> In addition, the Commission notes that '[t]he possibility to move data from one service provider to another would increase competition in some sectors, e.g. between social networks, and could also make data protection an element in this competition, when users decide to move away from a service they do not consider appropriate in terms of data protection'.<sup>38</sup>

Although both the proposed right to data portability and competition enforcement for facilitating data portability will diminish switching costs for users, there is a difference between the scope of application of the two regimes. As discussed above, action on the basis of Article 102 TFEU can only be taken if the restrictions on data portability qualify as abuse of a dominant position. In contrast, the right to data portability would apply in all situations where direct transfer of personal data is technically feasible and available. No dominance or abuse will have to be established in order for data subjects to be able to transfer their data between services. This has attracted criticism from scholars who have argued that the proposed right to data portability would defeat its own purpose and may even reduce consumer welfare.<sup>39</sup>

The criticism mainly relates to the fact that the right to data portability would apply as a *per se* rule without having to comply with the conditions for establishing abuse of dominance under competition law. Since the right would apply in the absence of market power and without taking efficiency arguments into account, it is said to reduce dynamic efficiency and lower incentives to innovate. A too extensive right to data portability could indeed have a negative effect on innovation, since it may place a disproportionate burden on small companies.<sup>40</sup> The right to data portability could discourage start-ups that do not have the necessary resources to comply with the obligations under the right to data portability to enter the market. In markets not characterized by a high degree of consumer lock-in, the imposition of a general right to data portability irrespective of market power, abusive conduct and possible justifications therefore seems less compelling.

Looking at the recitals to the proposal and the Impact Assessment report, it seems that the European Commission mainly aims to target social networks. Recital 51a of the amended proposal for a General Data Protection Regulation mentions social networks as example of a system to which the new right would apply. In the Impact Assessment report, the personal data that may be transferred under the right to data portability is described as '*photos or a list of friends*' and '*contact information, calendar history, interpersonal communications exchanges and other kinds of personally or socially relevant data*'.<sup>41</sup> The Commission could thus have confined

<sup>36</sup> Impact Assessment Report, p. 43.

<sup>37</sup> Impact Assessment Report, p. 28.

<sup>38</sup> Annex 5 of the Impact Assessment Report, p. 106.

<sup>39</sup> P. Swire & Y. Lagos, Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique, 72(2) *Maryland Law Review* 335 (2013), p. 349-350.

<sup>40</sup> P. Swire & Y. Lagos, Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique, 72(2) *Maryland Law Review* 335 (2013), p. 350-358.

<sup>41</sup> Impact Assessment Report, p. 28.

the scope of application of the right to data portability to social networks excluding other services for which the degree of lock-in does not justify a structural approach.<sup>42</sup> While the reduction of user lock-in is not the principal objective of the new right, the impact of data portability on competition is taken into account in the Impact Assessment report. In this regard, the Commission stated that '[t]he possibility to move data from one service provider to another would increase competition in some sectors, e.g. between social networks'<sup>43</sup>, but it did not consider the possible effects of the requirements of the right to data portability on sectors other than social networks. In particular, it seems that the Commission did not examine potential negative effects of a too extensive right to data portability.

Contrarily, the amendments of the European Parliament have significantly reduced the scope of the right of data portability by limiting its applicability to situations where a direct transfer of personal data between systems is technically feasible and available. However, this new formulation may be too permissive. While a sentence is added to one of the recitals stating that data controllers should be encouraged to develop interoperable data formats,<sup>44</sup> no binding and enforceable duty is imposed on controllers to develop technical measures for the transmission of personal data in situations where these are not yet available. The new formulation of the right to data portability may even discourage controllers from developing standards, as the duty to transmit data only applies when this is technically feasible. Instead of making the applicability of the right to data portability dependent on the fact whether direct transfer of data is already technically possible, the European Parliament could have limited the scope of application to specific electronic processing systems such as social networks in which a high degree of lock-in is present. This way, the switching costs that the right to data portability also aimed to reduce, would be addressed. Under the new formulation of the right to data portability by the European Parliament, controllers are legally entitled to continue to lock-in users as long as a direct transfer of personal data is not yet technically feasible.

## Conclusion

Because of uncertainty about the interpretation of some of the key terms in Article 15(2a) of the amended proposal for a General Data Protection Regulation, the exact scope of application of the right to data portability is still unclear. In particular, it remains to be seen to what services the new right would apply. While the European Commission is targeting social networks specifically, the right to data portability may also apply to other online services that process personal data. Insofar as these services do not create a high degree of lock-in for users, a right to data portability that applies generally could impose disproportionate burdens on smaller undertakings. However, the amendments of the European Parliament have substantially limited the scope of application of the right to data portability to situations where it is already technically feasible for controllers to directly transfer personal data.

Data portability can also be enforced under European competition law by way of Article 102 TFEU. The Commissioner for Competition has made clear that the adoption of the right to data portability does not exclude intervention in online services for facilitating data portability

<sup>42</sup> The high degree of lock-in in social networks can be illustrated by the fact that the growth of some of these services, such as Facebook, has not been affected by the numerous changes made to the privacy policies, despite the fierce opposition that these changes have sometimes caused on the part of the users (S.W. Waller, 'Antitrust and Social Networking', 90 *North Carolina Law Review* 1771 (2012), p. 1790-1792).

<sup>43</sup> Annex 5 of the Impact Assessment Report, p. 106.

<sup>44</sup> Recital 51a of the amended proposal for a General Data Protection Regulation.

on competition law grounds. In the coming months, the European Parliament will negotiate with the Council and try to reach agreement on the final text of the General Data Protection Regulation. It thus remains to be seen whether the right to data portability will be adopted in its current form. Nevertheless, it is clear that data portability is of growing importance in the online environment and can no longer be ignored by providers that offer services using personal data.



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